

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MICHELLE DAY,

Plaintiff-Appellant,

v

RICKY ALAN ENGVALL,

Defendant-Appellee.

UNPUBLISHED

October 16, 2007

No. 272478

Kent Circuit Court

LC No. 02-009694-DM

Before: Whitbeck, C.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce asserting the trial court erred in the valuation and distribution of assets. We affirm.

I. Marital History and Assets

The parties were married on June 26, 1995, and separated in September 2002. At the time of separation, plaintiff was 38 years of age and defendant was 52 years of age. This was plaintiff's third marriage and the second marriage for defendant. Plaintiff and defendant are the parents of one minor child, Olivia, born on March 24, 2000. Prior to entry of the judgment of divorce, plaintiff gave birth to another child who is not a product of the marriage relationship. Plaintiff initiated divorce proceedings on October 1, 2002, but due to the protracted nature of the litigation, which spanned 13 days of trial, and other delays a judgment of divorce was not entered until July 11, 2006.

At the time of the marriage, defendant was the sole owner of a manufacturer's representative business, Aidamark, Inc., and plaintiff was completing her medical residency in orthopedic surgery. Upon her residency completion, plaintiff worked for another physician for approximately one year, but in 1998 initiated her own medical practice. In 2001, plaintiff changed the name of her practice to Bone and Joint Care of West Michigan, Inc. and took on another physician as a partner. In 2002, plaintiff undertook extensive remodeling of her office suite, which included movement of walls, addition of an on-site x-ray machine with lead-lined walls and upgraded office and medical equipment. Plaintiff alleged the remodeling was necessary in order to maintain a viable and competitive orthopedic practice.

When the parties married, defendant owned the marital home without any indebtedness or mortgage for the property. The appraised value of the home at the onset of the marriage was

\$310,000. Defendant originally purchased the home in 1984 for \$75,000. In 1986, defendant completely replaced the structure at a cost of \$225,000. Following their marriage, in 1995, defendant added plaintiff's name to the deed for the home and the parties obtained an \$117,000 mortgage and \$100,000 line of credit for the property. The purpose of the mortgage was to consolidate plaintiff's medical school debt, which resulted in a cost savings through an overall reduction in the amount of monthly payments and receipt of a mortgage interest deduction. Part of the line of credit was used to perform remodeling on the home. In 2000, the parties procured another mortgage of \$210,000 and undertook additional remodeling, adding approximately 1,000 square feet to the home at a cost of \$157,000. Monies from the new mortgage were also used to pay off the outstanding balance of the 1995 mortgage. Overall, the parties estimate that \$362,100 was spent on remodeling and improvements to the home during the term of the marriage. At the time of their separation, \$200,000 remained owing on the current mortgage.

Both parties retained certified public accountants (CPAs) as experts to conduct valuations of plaintiff's business during the divorce proceedings. Defendant's expert, Eric A. Adamy, opined that the total value of plaintiff's medical practice was \$343,000, with plaintiff's share being \$185,220. Adamy used a fair market value approach to ascertain the value of the assets. Adamy opined that the value of the partners' net capital, adjusted for uncollected receivables, was valued at less than zero. Adamy further believed that many of plaintiff's remodeling and other identified expenses were "discretionary" and that it was necessary to add back \$266,830 of the remodeling debt in addition to present retirement benefits payable of \$90,961 to obtain the true value of the business. Adamy acknowledged that the \$90,961 for retirement benefits payable was a legitimate debt, but opined that the failure of plaintiff's business to pay this debt earlier in their fiscal year resulted in the inflation of business liabilities and the artificial reduction of the value of the practice. Specifically, Adamy stated:

Had the partners made the payment during the year, it would not show up as a liability I think it's misleading to show that that retirement plan contribution is deduction from the value of the practice, when if it had been paid at another time during the year, rather than being shown as a liability, it would not represent a deduction from the value of the practice. So, it's really a timing issue that has nothing to do with the value of the practice itself.

Adamy estimated total expenses for the practice of \$440,000, including \$30,000 for plaintiff's vehicle, \$47,000 for furniture, and \$169,000 in equipment and remodeling costs of \$187,000. In adding back remodeling expenses of \$266,830, Adamy explained that he believed this "portion of the expenditures were for cosmetic purposes" and added no positive economic value to the practice and, therefore, should not be used to determine the valuation of the business.

Plaintiff's expert, Leslie N. Prangley, used an accrual basis approach along with straight-line depreciation, finding the total value of the business assets to be \$312,846. Prangley determined the total liabilities of the business amounted to \$303,468, resulting in plaintiff's practice having a value of \$9,378. Prangley explained that the low value was in part attributable to the fact that the practice was relatively new coupled with plaintiff's lower than average wages as an orthopedic surgeon due to her higher percentage of geriatric patients, which generated lower fees based on Medicare reimbursement rates. Although in agreement on many aspects of their respective valuations, Prangley criticized Adamy's approach stating, in relevant part:

The major flaw I saw in removing the debt was that the debt was removed to increase the equity, but the assets that the debt related to were not removed. So you took out the debt that was owed on the asset. But, you didn't take the asset out. I didn't think that was at all correct.

In sum, Pranglely believed that Adamy's methodology of removing the liability while retaining the asset values resulted in "overstating the equity" in the business.

II. Trial Court Ruling

On May 26, 2006, the trial court issued its bench ruling, resulting in a 105-page transcript detailing testimony during the course of trial. The trial court did attribute fault for the breakdown of the marital relationship to plaintiff based on her participation in extramarital affairs and lack of "regret or remorse" for its impact on the marriage.

In reference to the distribution of assets, the trial court awarded defendant the marital home along with responsibility for the outstanding \$200,000 mortgage. The trial court noted that three separate appraisals of the home ranging from \$427,000 in November 2002, to \$460,000 in January 2003 and \$450,000 in November 2004 were submitted by stipulation of the parties. The trial court elected to use the appraised value of \$450,000 for the property. In making the award, the trial court indicated, "I have to give Mr. Engvall credit for the \$310,000 asset that he brought into the marriage here." Despite an increase in equity over the course of the marriage of \$140,000, the trial court observed that a debt of \$200,000 remained "due and owing" resulting in a "\$60,000 shortfall." The trial court indicated, in relevant part:

I will not give any credit or back anything out with respect to the \$117,000 loan or the \$110,000 in student loans, because it was a marital decision for the two of them to pay off the student loans. There was no intent in keeping that separate. The decision was made during the course of the marriage . . . that it was only economically wise to roll this into a mortgage, get the mortgage deduction on it, and pay less then you would pay otherwise. But, this was a marital decision to pay that off. If you want to look at it technically, Mr. Engvall, although he claims he's still paying on it, whether you can still track that money or not, he's getting the house, and he's stuck with the debt.

As a result, plaintiff did not receive any proceeds from the marital home.

In determining the proper valuation of plaintiff's business, the trial court adopted the methodology of defendant's expert, Adamy. Specifically, the trial court indicated it carefully reviewed the issue pertaining to the \$226,000 of debt incurred for the business and testimony that profitability for the business was significantly lower than the national average for similar practices, ruling, in relevant part:

I also looked very carefully at the issue regarding the \$226,000 in debt. I believe that if you look at the ratios that we were talking about before, that Dr. Day's income is 25 percent of income revenue generated by the business.

It made a lot of sense that Mr. Adamy was talking about the fact that that number would be higher, more consistent with the national average if the debt load on that business wasn't so high. That did make a lot of sense to me.

* * *

I had a chance to look over the assumptions made by the accountants. I believe that both of them made good points, but with respect to the huge debt to revenue ratio without a benefit to the practice within the next two to three years after the renovation, that Mr. Adamy's valuation of Bone and Joint Care appeared to be more equitable and made more sense to me than Mr. Prangle's.

In reference to plaintiff's retirement accounts, the trial court determined that her Schwab account was a marital asset valued at approximately \$60,000 at the time the parties separated. The trial court noted that defendant had given plaintiff \$20,000 in advance, after she left the marital home. The trial court construed this account as a marital asset and opined that because plaintiff "cashed in" and "used it, I think it has to be dealt with in the same fashion as the \$20,000 advance. It's not a gift. It's a marital asset." The trial court also determined that marital assets and funds were placed in plaintiff's "Bone and Joint Care 401-K."

Ultimately, the trial court developed a "ledger" for allocation of assets and liabilities to each party. In arriving at the final distribution of assets, the trial court ruled:

Her side, Bone and Joint Care of West Michigan, 185,220; marital home, 0; Schwab retirement \$49,607.45, Bone and Joint Care of West Michigan 401-K, 141,000; cash advance, 20,000; 2002 tax refund 18,475; IRS repayment, and then I put this in parenthesis, \$19,556.32, for a grand total of \$394,746.13.

On Mr. Engvall's side of the equation, I've got Aidamark, I have Mr. Prangle's value of 13 – I'll just tell you. I have Mr. Prangle's number of 136,000 less his pre-marital value of 43,500 for a total of 92,500; marital home, 0; Schwab One, 15,000; Schwab IRA SEP, I calculated it by taking the current amount of \$292,178.44, subtracted the pre-marital value of 251,702 to come up with the final value, marital value of \$40,476.44; Grand Bank checking, \$14,689.17; Murphy airplane, \$111,080; contents of home, \$7,000 for the other rental [sic] rug and 15,000 on the deminimous [sic] amount; boat dock, 3,000, BMW motorcycle, 1,000; 2002 tax refund, 18,475; total amount \$218,320.16.

The total amount of the parties' marital assets, \$613,066.74, half of that to each party would be \$306,533.37.

Then if you minus out Mr. Engvall's portion of that, the 218,000, you come up with an equalization factor of \$88,212.76.

The trial court left it to the discretion of counsel and their clients whether plaintiff would pay the equalization amount to defendant in cash or other assets, such as through retirement fund transfers.

III. Analysis

A. Standard of Review

This Court reviews the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is deemed "clearly erroneous" if, following a review of the entire court record, this Court is left with a definite and firm conviction that a mistake has occurred. *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). If the findings of fact by the trial court are upheld, this Court must then decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. A dispositional ruling by the trial court is deemed discretionary and should be affirmed unless this Court is left with the firm conviction that the distribution of property was inequitable. *Id.* at 152.

B. Marital Home

Plaintiff first challenges as error the failure of the trial court to award her any equity interest in the marital home. Plaintiff contends, based on the commingling of marital assets and debts incurred during the marriage, that the trial court should have determined the existence of \$250,000 of equity in the marital home based on the appraised value of \$450,000, less the outstanding mortgage of \$200,000. Plaintiff asserts the \$250,000 in equity should have been distributed equally between the parties and that the award of pre-marital interest to defendant was gratuitous and inequitable. Notably, neither party challenges the trial court's valuation of the home, or the accuracy of other figures used by the trial court in its determination.

The distribution of assets in a divorce proceeding is controlled by MCL 552.19, which provides:

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

Specifically, this statutory provision only allows the trial court to distribute assets, which have "come to either party by reason of the marriage." As a result, "[w]hen apportioning marital property, the court must strive for an equitable division of the increases in marital assets 'that may have occurred between the *beginning* and the end of the marriage.'" *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997), quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986). As a result, when determining the division of property in a divorce action, the trial court is required to initially identify any assets, along with their respective values, which comprise separate or pre-marital property. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). Typically, the equity accumulated by one spouse with regard to property that was owned before the marriage constitutes separate property, which that spouse is entitled to retain. *Korth v Korth*, 256 Mich App 286, 291-294; 662 NW2d 111 (2003).

In this case, the trial court properly acknowledged and credited defendant's premarital interest in the residence. The fact that the parties jointly expended monies in the remodeling and renovation of the property, which did not lead to a commensurate increase in the value of the residence is irrelevant. Hence, the trial court properly determined that the only marital increase in the asset was \$140,000, which was subsumed by the remaining mortgage debt of \$200,000 assigned to defendant as a liability, resulting in a negative equity for marital distribution. If anything, the trial court's determination did not go far enough to attain equity as defendant had to assume all of the outstanding liability for the home. Had full equity been attained, plaintiff would have been required to share in the \$60,000 equity shortfall.

Plaintiff's assertion of error is further expounded on by citation to MCL 552.401, which provides, in relevant part:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition improvement, or accumulation of the property.

The factors a court must consider in determining an equitable division of property are the duration of the marriage, the contributions of the parties to the marital estate, the ages of the parties, the necessities and circumstances of the parties, the life status of the parties, the health of the parties, the earning abilities of the parties, the past relations and conduct of the parties, and general principles of equity. *Sparks, supra* at 158-159. In this instance, it is questionable whether plaintiff actually contributed to the improvement of the marital home. While the appraised value of the home increased, it did not exceed the debt incurred to effectuate the remodeling and improvements to the property. In addition, plaintiff ignores part of the statutory language, which permits the trial court to determine what is "equitable under all the circumstances of the case." We find that it was not inequitable for the trial court to account for defendant's prior and substantial equitable interest in this property. In addition, plaintiff's argument fails to address the equitable nature of the distribution and the fact that any contribution to the increase in value was offset by the incurrence of substantial and remaining debt, which remains a liability to defendant.

C. Business Valuation

Plaintiff also takes issue with the trial court's valuation of her medical practice. Specifically, plaintiff contends the trial court erred in adopting the valuation methodology promoted by defendant's expert. Plaintiff asserts that Adamy's characterization of certain expenditures as discretionary and in reducing liabilities without a commensurate reduction of assets did not comprise acceptable accounting methodology.

Plaintiff contends the adoption by the trial court of Adamy's valuation was erroneous because "the value of a business is its assets, less its liabilities." *Kowalesky v Kowalesky*, 148 Mich App 151, 157; 384 NW2d 112 (1986). Because Adamy valued the practice by discounting or excluding certain liabilities as discretionary without a commensurate offset for the assets associated with those debts, plaintiff asserts the final figures were artificially and improperly

inflated. Rather, plaintiff contends her expert's use of an accrual basis for the valuation is more accurate and reflective of the actual debts and assets of the practice.

The trial court was presented with two experts who provided competing evidence and opinions regarding the value of plaintiff's private practice. We would first observe that there is no single method of valuation that is required to be uniformly applied in determining the value of business assets for the purpose of distributing marital property. *Kowalesky, supra* at 155. "Rather, this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous." *Id.* at 155-156. A trial court is provided tremendous latitude in its determination of the value of a marital asset, and this Court will not find clear error if the valuation is within the parameters established by the proofs, even if the trial court erred or miscalculated individual factors. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). This Court will only determine that the valuation of a marital asset by the trial court was clearly erroneous if, after a review of the complete record, we are left with the definite and firm conviction that a mistake has been made. *Kowalesky, supra* at 155; *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988).

We would note the trial court's recognition that plaintiff had made a choice regarding her primary clientele and the relatively low rate of reimbursement, which impacted the income of the practice. The trial court indicated this was a conscious choice made by plaintiff and that if she worked to attract other clients with higher insurance reimbursement rates that it would positively and significantly impact the income or receivables for the practice. Further, the trial court did not err in agreeing with defendant's expert that certain expenditures were discretionary in nature because they did not contribute or add value to the practice and would artificially reduce the value. We find it difficult to accept the conclusion of plaintiff's expert that a practice, even though relatively new, would have a total value of only \$9,378. Such a rigid formulation, which does not account for the necessity of liabilities incurred, or their potential to produce commensurate revenue, would permit individuals to intentionally reduce the value of a business.

In divorce proceedings, the trial court "has the best opportunity to view the demeanor of the witnesses and weigh their credibility." *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). This Court gives great deference to the findings of a trial court when they are based, as here, on the credibility of witnesses. *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). There was extensive testimony at trial by two qualified experts who clearly considered issues of corporate liability in their calculations of the practice's value and in their comparisons of different methods of valuation. Based on a determination of credibility, it was within the trial court's discretion to adopt the valuation proposed by defendant's expert. In addition, because the trial court determined a value for plaintiff's practice that was within the range of testimony provided by the experts, *Pelton, supra* at 25-26, we find no error.

D. Retirement Account Valuations

Finally, plaintiff takes issue with the timing of the trial court's valuation of her retirement account. Plaintiff contends it was error for the court to assign the value for distribution of this account as of December 2004, when its value was \$141,000, which improperly allowed for two years of accumulation following the parties' separation. Instead, plaintiff contends the trial court should have used the 2002 value of \$60,000. In addition, plaintiff argues the trial court permitted defendant an improper dual benefit regarding this asset by including the increased

value for distribution and failing to account for the unpaid pension benefits as a liability in the valuation of her business.

When dividing property, marital assets are typically valued at the time of trial or when the judgment is entered, although a court may, in its discretion, use an alternative date. *Byington, supra* at 114 n 4. As such, plaintiff provides no legal support for her argument that the retirement account should have been valued at the time of separation. “A party may not leave it to this court to search for authority to sustain or reject its position.” *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002) (punctuation and citation omitted).

Further, in challenging the timing of the valuation of this asset, plaintiff ignores the trial court’s determination that marital assets were used and included within her retirement accounts. Thus, any subsequent appreciation following the parties’ separation is still attributable to marital funds, which are subject to distribution. We would also note that the trial court was consistent in the dates used for the valuation of both parties’ pensions, as defendant’s pension was also valued at the time of trial. As such, any passive growth or additional investments contributed by either party during the interim period between their separation and divorce trial were treated similarly.

Plaintiff’s suggestion that the trial court permitted “double dipping” with regard to this asset is specious. The \$90,961 in payable retirement benefits for plaintiff’s practice was not solely earmarked for plaintiff’s retirement, but comprised payments for all employees of the practice. Further, plaintiff has not shown that any portion of this amount was actually paid into or included in plaintiff’s retirement account at the time of distribution. In this case, the trial court went to great lengths to equalize the division of assets between the parties despite the attribution of fault to plaintiff. Because we must affirm the trial court’s dispositive ruling unless we are left with the firm conviction that the property distribution was inequitable, *Sparks, supra* at 152, we find no basis to support the reversal or remand of this issue to the trial court.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood